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No. 82-114

In the Supreme Court of the United States

OCTOBER TERM, 1982

OSCAR OLIVA-CANTU, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge correctly instructed the jury concerning the weight it could accord the declarations of co-conspirators.

2. Whether the evidence was sufficient to support petitioner's conviction and sentence on a count alleging a conspiracy to distribute both cocaine and marijuana.

3. Whether the prosecutor's closing remarks were proper.

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OPINION BELOW

The decision of the court of appeals (Pet. App.) is reported at 677 F.2d 116.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1982. A petition for rehearing was denied on June 8, 1982. The petition for a writ of certiorari was filed on July 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner and Gloria Menchero were convicted of conspiring to possess with intent to distribute marijuana and cocaine, in violation of

21 U.S.C. 846.[1] Petitioner was also convicted of using a telephone to facilitate drug distribution, in violation of 21 U.S.C 843(b). He was sentenced to nine years' imprisonment on the conspiracy count to be followed by a three-year term on the telephone facilitation count, and was fined $30,000.

1. The evidence at trial showed that petitioner participated in a large-scale narcotics distribution scheme involving, among others, Carlos Quesada and co-defendants Menchero, Rodriquez Gallo, and Jose Piniero. Between November 1977 and April 1978, Gallo sold large quantities of drugs to petitioner, Quesada and others in the Miami, Florida area. In addition to purchasing cocaine from Gallo, Quesada joined Gallo in a venture involving the importation of a large quantity of marijuana. Gallo sold 14,000 pounds of this marijuana to petitioner and assigned $20,000 of the amount owed to him as the result of this purchase to Quesada (Tr. 909, 916-918, 922, 944, 945).[2]

During this period, local police officers monitored calls made to and from Quesada's residence pursuant to an interception order issued by a state judge.[3] Many of the calls involved Quesada's efforts to locate petitioner in order to collect the marijuana debt (*e.g.*, Tr. of Calls 563, 565, 631, 681, 1069, 1248). Other calls, which typically employed code words used by drug traffickers, involved orders for quantities of cocaine or arrangements to distribute the substance (*e.g.*, Tr. 550, 668, 673; Tr. of Calls 79, 148, 1085). For ex-

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[1] The indictment charged a total of eight defendants, including petitioner, with various drug-related offenses. Prior to trial, the indictment was dismissed against three defendants. Charges against Carlos Quesada were dismissed when he agreed to testify as a government witness. Petitioner and three co-defendants—Menchero, Rodriguez Gallo, and Jose Piniero—were to be tried together in March 1980, but a severance was granted as to Gallo and Piniero. Both Gallo and Piniero eventually were convicted of conspiracy to distribute drugs (21 U.S.C. 846) and use of the telephone to facilitate the scheme (21 U.S.C. 843(b)). Piniero's petition for a writ of certiorari (No. 81-6972) is now pending before this Court.

[2] "Tr." refers to the trial transcript. Citations to the trial transcript were derived from the government's brief filed in the court of appeals.

[3] The propriety of the issuance of this interception warrant is addressed in our Brief in Opposition to No. 81-6972.

ample, on March 11, 1978, in response to an inquiry by petitioner as to whether Quesada could help him meet a "commitment," Quesada responded that he had half a "big wheel" of cocaine (Tr. of Call 681 at 8, 16-17). On March 21, 1978, Quesada informed Piniero that a load of cocaine would be arriving on Wednesday, that Gallo had told him two or three kilos were due to go to petitioner, but that he had advised Gallo that petitioner should first be required to pay his other debts (Tr. 244, 631-633; Tr. of Call 1069 at 3-4). On March 23, 1978, petitioner advised Quesada that he had left a quantity of drugs at his son's house (Tr. 637-639; Tr. of Call 1204 at 1). And, on March 24, 1978, Quesada was overheard telling Gallo that he had finally contacted petitioner and that petitioner had a quantity of drugs. During that conversation, Piniero came on the line and interjected that petitioner had told him that petitioner would be delivering a "window" of cocaine (Tr. 644-657; Tr. of Call 1248 at 2-3).

Later that day, Quesada placed a call to the residence of Menchero. Gallo answered the call and, in response to Quesada's query, stated "its here" (Tr. 650-651; Tr. of Call 1264 at 1). Upon hearing this, police officers obtained a warrant authorizing a search of the Menchero home. During the execution of the warrant, Menchero led the officers to a closet that contained 55 pounds of cocaine valued at approximately $20 million (Tr. 680-681, 687, 699, 704-705).

2. At the beginning of trial, the court conducted a hearing outside the presence of the jury to determine whether there was sufficient independent evidence that a conspiracy existed and that each of the defendants was a participant in that conspiracy to warrant the admission into evidence of the extra-judicial statements made by them. Fed. R. Evid. 801(d)(2)(E). To establish petitioner's participation in the conspiracy, the government presented Quesada's testimony that he and Gallo had imported a large shipment of marijuana, that Gallo owed him $20,000 for his participation in the scheme, and that Gallo had instructed him to collect this amount from petitioner (Tr. 208-210, 216, 219, 225-227). In addition, the government introduced four tape recordings of intercepted calls between Quesada and

petitioner and the explanatory testimony of the narcotics officer who monitored them and was conversant with the code terms typically used by drug dealers (Tr. 131-164; Exhs. 1-4). The calls involved Quesada's efforts to collect the marijuana debt from petitioner (*e.g.* Tr. 137, 142; Tr. of Call 613 at 1, 3, 16-17) as well as other drug-related topics (including a solicitation of cocaine by petitioner and a statement that petitioner had left a quantity of drugs with his son for Quesada to pick up) (Tr. of Call 631 at 8; Tr. of Call 1204 at 1-2).

At the close of this evidence, the trial judge ruled that independent evidence sufficiently established that petitioner was a participant in the conspiracy. Accordingly, he admitted not only the four intercepted conversations to which petitioner was a party, but also conversations between the other co-conspirators that implicated him in the drug distribution scheme. Fed. R. Evid. 801(d)(2)(E).

ARGUMENT

1. At the conclusion of trial, petitioner requested the court to instruct the jury that, in determining whether a defendant was a participant in a conspiracy, it should consider only evidence relating to his own acts or statements, and that it could not rely upon the declarations of other participants unless his involvement in the conspiracy was first established by such evidence beyond a reasonable doubt (Pet. 24). Petitioner contends (*id.* at 21-27) that the trial court erred in refusing to give the requested instruction. This claim is totally without merit.

The trial court correctly admitted into evidence the out-of-court statements of petitioner's co-conspirators. Fed. R. Evid. 801(d)(2)(E).[4] Once admitted, that evidence was properly considered by the jury in ascertaining petitioner's guilt. As the court explained in *United States* v. *James*, 576 F.2d 1121, 1130 (5th Cir. 1978), modified en banc, 590 F.2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979), "Rule

[4] Fed. R. Evid. 801(d)(2)(E) provides:

> A statement is not hearsay if *** [t]he statement is offered against a party and is *** a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

104(a) [of the Federal Rules of Evidence] [5] requires that the judge alone make the threshold determination of the admissibility of the evidence. The jury is to play no role in determining the admissibility of [co-conspirator's] statements" (576 F.2d at 1130; footnote omitted). Thus, under Rule 104(a), "[i]f the court is satisfied that the statements [of co-conspirators] are admissible, then they are to be considered by the jury along with the other competent evidence in determining the defendant's guilt or innocence. 'To accept the problem as one of admissibility of evidence is to recognize that the declarations, if admissible, shall be considered by the jury *in reaching* its determination upon the issue of innocence or guilt'" (576 F.2d at 1132, quoting *Carbo* v. *United States*, 314 F.2d 718, 736 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964) (emphasis in the original)). See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 701 n.14 (1974); *United States* v. *Giese*, 597 F.2d 1170, 1197-1198 (9th Cir.), cert. denied, 444 U.S. 979 (1979); *United States* v. *Stanchich*, 550 F.2d 1294, 1297-1298 (2d Cir. 1977); *United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977); *United States* v. *Trowery*, 542 F.2d 623, 626-627 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977). Indeed, as the court recognized in *Carbo* v. *United States*, *supra*, 314 F.2d at 736, were the rule to the contrary, so as to require the jury to be satisfied beyond a reasonable doubt of the defendant's position as a co-conspirator before considering the inculpatory statements of alleged co-conspirators, "there [would be] no occasion ever to resort to the declarations at all."

The authorities upon which petitioner relies lend no support to his claim of error. In *United States* v. *Whitley*, 670 F.2d 617, 621 (5th Cir. 1982), the court held that "[t]he trial court determines whether to admit statements by co-conspirators as nonhearsay under Fed. R. Evid.

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[5] Fed. R. Evid. 104(a) provides:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

801(d)(2)(E). Once admitted, the jury assesses the weight and credibility of such statements, just as it evaluates all evidence."[6] In *United States* v. *Horton*, 646 F.2d 181, 186 (5th Cir.), cert. denied, No. 81-599 (Nov. 2, 1981), the court, noting the rescission of a Fifth Circuit pattern instruction that would have precluded the jury from considering the statements of alleged co-conspirators until after they were satisfied the defendant was a member of the conspiracy, held that it was not prejudicial error to have omitted the instruction. And, as petitioner concedes (Pet. 23), in *United States* v. *Giese*, *supra*, 597 F.2d at 1197-1198, the court expressly held that, "[o]nce the trial court decides that independent evidence * * * would support a finding connecting the defendant to the conspiracy, 'it is the jury's function to determine whether the evidence, including the [co-conspirators'] declarations, is credible and convincing beyond a reasonable doubt'" (quoting *Carbo* v. *United States*, *supra*, 314 F.2d at 737).

2. Petitioner also contends (Pet. 27-31) that the evidence was insufficient to support his conviction on the conspiracy count, which alleged a scheme to possess with intent to distribute both marijuana and cocaine. This fact-bound question, resolved against petitioner by both courts below,[7] warrants no further review by this Court. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, when the evidence is considered in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), there can be no question but that it fully supports his conviction on the conspiracy count.

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[6] As a result, the *Whitley* court found that it was not prejudicial error for the trial judge to instruct the jury that it could not consider the statements of alleged co-conspirators against the defendant until it had first concluded from the defendant's own acts and statements that he was a member of the conspiracy (670 F.2d at 621). We do not agree with the court's dictum, however, that such an instruction has continuing vitality following enactment of the Federal Rules of Evidence (*ibid.*).

[7] By affirming petitioner's conspiracy conviction the court of appeals rejected his sufficiency claim, and the trial judge denied his motion for a judgment of acquittal.

With respect to the marijuana branch of the drug conspiracy, Gallo instructed Quesada to look to petitioner for payment of his (Quesada's) share of the proceeds from their marijuana importing venture. Quesada testified that petitioner had purchased 14,000 pounds of marijuana imported by Quesada and Gallo and had incurred a $20,000 debt as the result of this transaction (Tr. 916-917, 944).

The evidence relating to petitioner's participation in the cocaine distribution component of the scheme is equally compelling. During one monitored telephone conversation with Quesada, petitioner stated that he had dropped a "very pretty thing" off at the home of his son, and that Quesada should stop off there (Tr. of Call 1204 at 1). On another occasion, during a three-way conversation between Quesada, Gallo and Piniero, Piniero stated that petitioner told him that he was "going to go by there with one more little window" for Quesada but that he would be unable to obtain enough for everyone (Tr. of Call 1248 at 2-3). During a third conversation, petitioner told Quesada that one of the reasons he wanted to speak to him was that petitioner had just made a drug commitment with one of his partners. Quesada responded "I have * * * for a guy * * * one half a big wheel Chico" (Tr. of Call 631 at 8). Quesada also explained that he had supplied three big "apparatus," or three "pretty ones" to another dealer and that he anticipated making a substantial profit on the deal (*id.* at 17). Finally, during a conversation of March 21, 1978, which involved the continuing efforts of Piniero and Quesada to obtain payment from petitioner, Quesada stated that Gallo had agreed to furnish petitioner "two or three suits" that were due to arrive shortly (Tr. of Call 1069 at 3). A narcotics officer testified that, in drug parlance, the terms "pretty one," "window," "apparatus," "big wheel" and "suits" all refer to quantities of cocaine (Tr. 612, 614-615, 632-633, 638-639, 647-648). From these conversations and the officer's explanations, the jury could clearly infer that petitioner was

dealing in cocaine as well as in marijuana,[8] that he had furnished the substance to both Gallo and Quesada, and that he looked to Quesada to furnish him with cocaine to meet his commitments to others. See *United States* v. *Harbin*, 601 F.2d 773, 782 (5th Cir. 1979).[9]

3. Finally, petitioner claims (Pet. 31-34) that the prosecutor made two remarks during closing arguments that improperly suggested that he was connected to organized crime. The challenged remarks, however, were permissible in the context of this case.

During closing argument, the prosecutor explained to the jury that persons engaged in drug dealing do not discuss their activities openly in their telephone conversations with one another. In particular, he stated that "when you have an agreement and especially in narcotics, in the underworld of narcotics, these people in person and on the telephone, especially on the telephone, do not say, let's say, between Rudolfo Rodriguez and Carlos Quesada—they do not say Rudolfo, how would you like to sell me 20,000 pounds of marijuana?" (Tr. 1156).

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[8] Petitioner observes (Pet. 28) that, at one point, Quesada denied dealing in cocaine or marijuana with him (Tr. 915). In view of the clear import of the intercepted telephone conversations, the substance of which Quesada testified that he could not recall (Tr. 946), the jury had a fully sufficient basis upon which to reject this testimony.

[9] In light of this evidence there is no merit to petitioner's argument (Pet. 34-35) that his sentence was excessive because it exceeded the maximum authorized for participation in a conspiracy limited to possession with intent to distribute marijuana. As we have shown, the evidence did, in fact, demonstrate petitioner's involvement in the cocaine component, as well as in the marijuana component, of the conspiracy. More importantly, however, whether the jury found or could have found that he participated in this particular object of the conspiracy is inconsequential. As explained in *United States* v. *Bolts*, 558 F.2d 316, 325-326 (5th Cir. 1977), cert. denied, 439 U.S. 898 (1978), "where the indictment charge[s] a conspiracy to commit violations of several related statutory [drug] provisions in what was essentially one narcotics trafficking enterprise, it was *** enough that the jury found that [the defendant] knowingly and intentionally was a member of the conspiracy. The theory of vicarious liability *** exposed him to the maximum sentence for which any of the conspirators could be charged under the conspiracy count."

During his closing argument, counsel for petitioner compared the tactics of the police officer who conducted the surveillance of Quesada's telephone with those of a member of the Iranian secret police (Tr. 1121). On rebuttal, the prosecutor responded (Tr. 1155-1156) that this statement was tantamount to an assertion that the police should not fight drug trafficking through clandestine means. He stated that "the police are not supposed to hide their heads in the sand. They are out there trying to stop narcotics in this case the wiretap is an attempt to do that" (*ibid.*).

Neither of the remarks decried by petitioner either mention him or exceed the limits of proper argument. The first statement was nothing more than an explanation, fully supported by the testimony of both Quesada and the officer who supervised the interceptions, that drug dealers employ coded language and the jurors should therefore look beyond the literal meaning of the words used during the conversations. The prosecutor's second statement was a "fair reply" to the insinuation by petitioner's attorney that law enforcement officials had engaged in police state tactics. See, *e.g.*, *United States* v. *Sindona*, 636 F.2d 792, 806 (2d Cir. 1980), cert. denied, 451 U.S. 912 (1981) (when integrity of prosecution attacked, responsive retort proper); *United States* v. *Praetorius*, 622 F.2d 1054, 1060-1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980) (when defense attacks conduct of government's agents, prosecutor entitled to reply with suitable rebutting language); *United States* v. *Schaffer*, 600 F.2d 1120, 1122-1123 (5th Cir. 1979) (prosecutor's statement "fair reply" to defendant's argument). And, even if the prosecutor's remarks could be construed as an insinuation that petitioner was involved in extensive drug dealings and was associated with known traffickers, that is precisely what the government's evidence showed. Accordingly, when viewed in the context of the evidence and the arguments at trial, the prosecutor's remarks were in no way improper.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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